

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

In re:)	
)	
PINNACLE AUTO LEASE INC.,)	Case No. 17-10319-SAH
)	(Chapter 11)
Debtor.)	

**MOTION OF BANK OF COMMERCE TO PROHIBIT DEBTOR
IN POSSESSION'S USE OF CASH COLLATERAL, WITH BRIEF
IN SUPPORT AND NOTICE OF OPPORTUNITY FOR HEARING**

NOTICE OF OPPORTUNITY FOR HEARING

Your rights may be affected. You should read this document carefully and consult with your attorney about your rights and the effect of this document. If you do not want the court to grant the requested relief, or you wish to have your views considered, you must file a written response or objection to the requested relief with the clerk of the United States Bankruptcy Court for the Western District of Oklahoma, 215 Dean A. McGee Avenue, Oklahoma City, OK 73102, no later than 14 days from the date of filing of this request for relief. You should also serve a file-stamped copy of your response or objection on the undersigned movant/movant's attorney and any others who are required to be served. If no response or objection is timely filed, the court may grant the requested relief without a hearing or further notice.

The 14-day period includes the three (3) days allowed for mailing provided for in bankruptcy rule 9006(f).

Bank of Commerce ("BOC"), by and through its undersigned counsel, hereby respectfully moves for an order prohibiting the debtor in possession in the above-captioned matter, Pinnacle Auto Lease Inc. (the "Debtor"), from continuing to use BOC's cash collateral in violation of section 363(c) of title 11 of the United States Code (the "Bankruptcy Code"). In support of this Motion, BOC shows the Court as follows:

I. JURISDICTION AND STATUTORY AUTHORITY

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334.
2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.
3. This is a core proceeding pursuant to 28 U.S.C. § 157(b).
4. The statutory predicates for the relief requested are Bankruptcy Code sections 105 and 363.

II. BACKGROUND

5. On February 2, 2017 (the “Petition Date”), the Debtor filed its Voluntary Petition pursuant to chapter 11 of the Bankruptcy Code.

6. The Debtor is an auto finance company engaged in the business of financing leases of used automobiles.

7. Prior to the Petition Date, on or about August, 25, 2015, the Debtor, along with several co-makers, for good and valuable consideration, made, executed, and delivered to BOC that certain Renewal and Increased Promissory Note dated August 25, 2015 (as subsequently modified, the “Note”), in the original principal amount of \$7,600,000.00.

8. On or about August 25, 2015, to secure the obligations under the Note, the Debtor executed and delivered to BOC that certain Security Agreement, granting Plaintiff a security interest in certain collateral, as more particularly described therein and including:

- (a) All assets and property of the [Debtor] of every kind and character, real, personal and mixed, now owned or hereafter acquired and wherever located, including, without limitation, accounts (including but not

limited to contract rights), chattel paper, deposit accounts, documents, fixtures, general intangibles (including but not limited to contract rights), goods (including but not limited to accessions, equipment, inventory and vehicles), instruments, investment property, letter of credit rights, negotiable documents of title, commercial tort claims, and payment intangibles, and,

(b) All proceeds and products of the foregoing, including, without limitation, proceeds of insurance payable by reason of loss or damage to any of the foregoing, proceeds of life insurance policies any return, refunded, or unearned insurance premiums with respect to any of the foregoing.

9. As additional security for the Note, on or about August 25, 2015, the Debtor executed and delivered to BOC that certain Master Assignment of Auto Leases as Security for Payment of Debt, granting Plaintiff a security interest in all auto leases covering autos purchased and/or refinanced with loan proceeds provided by BOC.

10. BOC's security interests in the respective collateral have been properly perfected pursuant to applicable state law, including, but not limited to, by the filing of a UCC-1 Financing Statement and in the office of the County Clerk of Oklahoma County, Oklahoma on August 28, 2015 as Document No. 20150828020902020 (the "UCC Financing Statement").

11. On or about June 30, 2016, the Debtor, for good and valuable consideration, made, executed, and delivered to Plaintiff that certain Modified and Increased Promissory Note dated June 30, 2016, along with that certain First Amendment to Loan Agreement dated June 30, 2016, which, *inter alia*, modified the repayment terms and increased the principal balance of the indebtedness under the Note to \$7,760,000.00.

12. The Note matured by its own terms on August 25, 2016, with all outstanding amounts thereunder becoming due and payable on that date.

13. On or about October 25, 2016, Plaintiff and the Debtor, among others, entered into that certain Conditional Forbearance Agreement, which required, *inter alia*, that the Debtor make monthly payments to Plaintiff in the amount of \$135,000.00 on the indebtedness under the defaulted Note.

14. The Debtor defaulted under the terms and conditions of the Forbearance Agreement by failing to meet the obligations thereunder, including, but not limited to, failing to make the payment due for December 2016.

15. As of January 25, 2017, there is due and owing to BOC under the Note the principal amount of \$7,232,331.32, plus accrued interest in the amount of \$37,949.67, plus interest accruing thereafter, and all other expenses, fees, charges, advances, taxes, and assessments as provided for in the loan documents.

16. On January 31, 2017, BOC commenced an action in the District Court of Oklahoma County, Oklahoma against the Debtor, which action is styled *Bank of Commerce v. Pinnacle Auto Lease, Inc., et al.*, No. CJ-2017-571. By such action, BOC sought judgment on the Note, foreclosure of BOC's collateral, and the appointment of a receiver over the Debtor.

17. A hearing on BOC's request for the appointment of a receiver over the Debtor was set for February 14, 2017. Before that hearing could occur, the Debtor commenced this action.

18. On the Petition Date, the Debtor filed its Schedules of Assets and Liabilities [Dkt. No. 1]. BOC was listed on Schedule D as having a disputed claim in the amount of \$7,246,668.60, secured by collateral worth only \$4,884,881.78.

III. ARGUMENTS AND AUTHORITIES

BOC requests that the Court (i) prohibit the Debtor's use of any of BOC's cash collateral and (ii) require the Debtor to deposit BOC's cash collateral in a segregated account with BOC.

A debtor may not use, sell, or lease cash collateral unless (a) each entity that has an interest in the cash collateral consents, or (b) the court, after notice and a hearing, authorizes such use, sale, or lease of the cash collateral. 11 U.S.C. § 363(c)(2). Additionally, the Court, on request of an entity that has an interest in the cash collateral, shall prohibit or condition the use, sale, or lease of cash collateral as is necessary to provide adequate protection of such interest. 11 U.S.C. § 363(e) ("the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest"). The burden of proof with regard to adequate protection in cash collateral matters is on the debtor in possession, with the exception that the entity asserting an interest in the cash collateral must establish the validity, priority, and extent of its interest. 11 U.S.C. § 363(p).

Under the loan documents with BOC, the Debtor granted BOC a security interest and liens on all of the Debtor's assets, including all of the Debtor's cash collateral (as defined in Bankruptcy Code section 363). Specifically, by the Security Agreement

entered into between the Debtor and BOC on or about August 25, 2015, the Debtor granted BOC a security interest in:

- (a) All assets and property of the [Debtor] of every kind and character, real, personal and mixed, now owned or hereafter acquired and wherever located, including, without limitation, accounts (including but not limited to contract rights), chattel paper, deposit accounts, documents, fixtures, general intangibles (including but not limited to contract rights), goods (including but not limited to accessions, equipment, inventory and vehicles), instruments, investment property, letter of credit rights, negotiable documents of title, commercial tort claims, and payment intangibles, and,
- (b) All proceeds and products of the foregoing, including, without limitation, proceeds of insurance payable by reason of loss or damage to any of the foregoing, proceeds of life insurance policies any return, refunded, or unearned insurance premiums with respect to any of the foregoing.

The Conditional Forbearance Agreement, which was entered into by the Debtor on or about October 25, 2016, verifies as much, explicitly stating that the repayment of the Note is secured by “(a) a blanket security interest covering all of the Personal Property owned by the Borrowers, (b) a specific lien on each item of lease auto inventory, [and] (c) a collateral assignment of the Borrowers’ interest as lessee in each such auto lease”

Prior to the Petition Date, the Debtor’s primary source of operating capital was BOC’s cash collateral. Specifically, the Debtor’s operations were funded through periodic lease payments received from vehicle lease agreements with the Debtor acting as lessor. Those leases, as well as the stream of payments resulting therefrom, constitute BOC’s collateral. BOC’s security interests in that collateral have been properly perfected through, *inter alia*, the filing of the UCC Financing Statement.

Counsel for the Debtor has represented to counsel for BOC that the Debtor has not utilized BOC's cash collateral since the Petition Date, but may require its use in the near future. BOC does not consent to the Debtor's use of its cash collateral in any manner. BOC further asserts that the Debtor is unable to meet its burden of establishing that BOC's interests can be adequately protected such that the Debtor may use cash collateral. Absent such proof, the Court should prohibit any use of BOC's cash collateral.

The Debtor's own schedules provide that BOC is grossly undersecured by over \$2.3 million. Any postpetition use of BOC's cash collateral by the Debtor would unfairly erode BOC's collateral position. In order to protect BOC from any improper actions with regard to BOC's cash collateral, the Court should prohibit any further use of BOC's cash collateral and order the Debtor to deposit further cash collateral in a segregated account established by BOC. Consequently, BOC's Motion should be granted.

IV. CONCLUSION

WHEREFORE, secured creditor Bank of Commerce respectfully requests this Court enter an order (a) prohibiting the Debtor's use of cash collateral; (b) ordering the Debtor to deposit cash collateral in a segregated account to be established by BOC; and (c) granting such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/ Melvin R. McVay, Jr.

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CERTIFICATE OF SERVICE

This is to certify that on the 8th day of February, 2017, true and correct copies of the above and foregoing were mailed by first class mail, postage prepaid, to all parties listed on the attached Service List.

/s/ Melvin R. McVay, Jr.

Label Matrix for local noticing
1087-5
Case 17-10319
Western District of Oklahoma
Oklahoma City
Wed Feb 8 16:06:09 CST 2017

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End of Label Matrix
Mailable recipients 8
Bypassed recipients 0
Total 8